FILED
OCT 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-485

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

TOWNSHIP OF LELAND and VILLAGE OF NORTHPORT,
Petitioners,

v.

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,

and

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT INDIAN TRIBE'S BRIEF IN OPPOSITION

WILLIAM CHARLES RASTETTER, III
6700 French Road
Cedar, Michigan 49621
(616) 228-6300
Counsel of Record for Respondent Grand Traverse Band of Ottawa and Chippewa Indians

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

Sixth Circuit Case No. 96-1168

Whether compelling reasons exist to grant writ of certiorari where the court of appeals' decision neither conflicts with another decision nor involves an important question of federal law.

Whether review by the Court is appropriate where the asserted basis involves legal conclusions not made by the district court which are premised upon factual assertions not contained in the record.

Sixth Circuit Case No. 96-2396

Whether the attorney's fees award affirmed below was premised upon an alternate basis consistent with the Court's decisions.

PARTIES TO THE PROCEEDING

The petition identifies the parties to the first proceeding below (Sixth Circuit No. 96-1168) as the parties to this proceeding: petitioners Leland Township and the Village of Northport (defendants/appellants below) and respondent Grand Traverse Band of Ottawa and Chippewa Indians (plaintiff/appellee below). However, the petition fails to designate the Director of the Michigan Department of Natural Resources as also being a respondent in this proceeding. According to Rule 12.6 of the Rules of this Court, the Director of the Michigan Department of Natural Resources is a party to this proceeding due to being a party (defendant/appellee) to the second proceeding below (Sixth Circuit No. 96-2396), *see* Pet. 1, 20-28 and Appendix B (especially B-16 thru B-18).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT OF CERTIORARI	8
I. SIXTH CIRCUIT CASE NO. 96-1168	8
A. The Petition Misrepresents The Decision Below	8
B. The Questions Presented Were Not Decided Below	11
C. Conclusion	13
II. SIXTH CIRCUIT CASE NO. 96-2368	14
A. Attorney's Fees Award Was Premised Upon An Alternate Basis Consistent With The Court's Decisions	14
B. GTB Is Prevailing Party With Respect To Unaddressed § 1983 Claim Premised On Fourteenth Amendment Due Process And Liberty Interests	15
1. Deprivation of liberty interest	16
2. Deprivation of property right	17
3. Non-fee claims reasonably related to unaddressed § 1983 claim	18
C. GTB Also Could Be Considered Prevailing Party Under 42 U.S.C. § 1988 With Respect To The Claim Arising Under The Treaty Of 1836	19
CONCLUSION (Sixth Circuit Case Nos. 96-1168 and 96-2396)	20

TABLE OF AUTHORITIES

CASES	Page
Anderson v. Liberty Lobby, 477 U.S. 242 (1986)	11
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	11
Farrar v. Hobby, 506 U.S. 103 (1992)	18
Greene v. McElroy, 360 U.S. 474 (1959)	17
Hagans v. Lavine, 415 U.S. 528 (1974)	18
Hensley v. Eckerhart, 461 U.S. 424 (1983)	18
Lynch v. Household Finance Corp., 405 U.S. 538 (1972)	18
Maher v. Gagne, 448 U.S. 122 (1980)	15, 19
Matsushita Electronic Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)	11
Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968)	18
Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504 (W.D. Wash. 1988)	8, 18
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	17
Seufert Brothers Company v. United States, 249 U.S. 194 (1919)	8
Singleton v. Wulff, 428 U.S. 106 (1976)	13
Smith v. Robinson, 468 U.S. 992 (1984)	16, 18
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	19
United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981)	13, 19
United States v. Michigan, 653 F.2d 277 (6th Cir. 1981)	8, 16
United States v. Michigan, 712 F.2d 242 (6th Cir. 1983)	8
United States v. Oregon, 718 F.2d 299 (9th Cir. 1983)	8
United States v. Washington, 935 F.2d 1059 (9th Cir. 1991)	14, 19
United States v. Winans, 198 U.S. 371 (1905)	8, 13, 20
Washington v. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)	7, 9
Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983)	17

TABLE OF AUTHORITIES—Continued

CONSTITUTION — Page

Article VI, Clause 2 7
Fourteenth Amendment 15, 16, 18

STATUTES

28 U.S.C. § 1343(a)(3) 15, 19
42 U.S.C. § 1983 ..... 15, 19, 20
42 U.S.C. § 1988 ..... 15, 18

TREATIES

Treaty with the Ottawa and Chippewa, March 28, 1836, 7 Stat. 491 (1836) 5, 19
Treaty with the Ottawa and Chippewa, July 31, 1855, 11 Stat. 621 (1855) 2, 5, 12, 13

RULES

Supreme Court Rule 10 8
Supreme Court Rule 10(a) 8
Supreme Court Rule 10(c) 9
Supreme Court Rule 12.6 ii
FED. R. C.V. P. 56(c) 5
FED. R. CIV. P. 56(e) 5, 11
FED. R. CIV. P. 56(f) 5, 11

OTHER AUTHORITIES

10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2739 (2nd ed. 1983) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-485

TOWNSHIP OF LELAND and VILLAGE OF NORTHPORT,
Petitioners,

v.

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,

and

DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT INDIAN TRIBE'S BRIEF IN OPPOSITION

The respondent Grand Traverse Band of Ottawa and Chippewa Indians (GTB or Tribe) respectfully requests the Court to deny the petition for writ of certiorari filed by the municipal defendants Leland Township and the Village of Northport (Municipalities) seeking review of the Sixth Circuit's decisions in this case. The opinion (Pet. App. A-1 thru A-24) affirming the district court's declaratory judgment is reported at 141 F.3d 635 (6th Cir. 1998); the opinion (Pet. App. B-1 thru B-20)

affirming the district court's award of attorney's fees is not published.

STATEMENT OF THE CASE

The Municipalities' statement overlooks the fundamental fact that the original defendant, the Director of the Michigan Department of Natural Resources (MDNR),[1] proposed the compromise implemented by the district court's partial summary judgment which was affirmed by the court of appeals. Instead of requesting a declaratory judgment against the MDNR regulation prohibiting *permanent* mooring by commercial fishing vessels at the Municipalities' public marinas/harbors of refuge, the Tribe only sought to establish that tribal fishing vessels may utilize designated transient mooring[2] slips on the same terms and conditions as all other transient boats on the Great Lakes.

This litigation involves public marinas/harbors of refuge at Leland and Northport in Leelanau County, Michigan, which are within GTB's reservation[3] described in Article I, clause Fifth of the July 31, 1855 Treaty with the

---

1 "The Director of the Michigan Department of Natural Resources ('MDNR') was also a named Defendant in the suit. Significantly, however, MDNR does not appeal the judgment." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 141 F.3d 635, 637 n.1 (6th Cir. 1998) (Pet. App. A-2).

2 The MDNR Director's brief filed July 31, 1995 with the district court noted that the term "mooring" is synonymous with "docking" within the context of this litigation. (R. 62 at 3 [JA:307]). Mooring slips are the areas between the docks within the public marinas. [Note that "JA" (joint appendix) references the record in 6th Cir. Case No. 96-1168 while "Apx." references the record in 6th Cir. Case No. 96-2396, due to a rule change prior to briefs being submitted in the second appeal.]

3 "The Northport and Leland marinas that are the subject of this litigation today are located within the boundaries of these 1855 reservations." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 284 (W.D. Mich. 1995) (Pet. App. E1-2).

Ottawa and Chippewa, 11 Stat. 621. These marinas, owned and operated by the Municipalities pursuant to agreements with the MDNR, were funded primarily with federal and state grants earmarked for construction of harbors of refuge and transient mooring on the Great Lakes.[4] The transient mooring slips operate on a first-come, first-serve basis. Once a transient vessel is registered at these public marinas, it may stay for a duration of fourteen days before being required to leave.[5] For much of the year, these facilities are virtually empty.[6] Even during June and September, less than half the available mooring slips are utilized by transient boaters.[7] To minimize the impact upon these public marinas, GTB's Tribal

---

[4] The Leland marina has 58 slips available for mooring by transient boaters and can accommodate 120 vessels (including slips and rafting) during periods of peak use, and the Northport marina has 100 mooring slips and can accommodate an additional 16-18 vessels on breakwalls during periods of peak use. The total construction costs of the Leland public marina/harbor of refuge amounted to $2,054,124.00, and each government contributed the following portions: federal=$1,271,052.00, state=$768,072.00, and local municipality=$15,000.00. The total construction costs of the Northport public marina/harbor of refuge amounted to $2,061,320.00, and each government contributed the following portions: federal=$405,125.00, state=$1,066,892.00, and local municipality=$589,303.00. R.36: Exhibit 17 submitted with GTB's summary judgment motion filed 4/17/95 (DNR Director's answer to GTB's requests for admission paragraphs 4-7 at pages 2-3 [JA:163-64]).

[5] *See, e.g.*, the rules governing the G. Marsten Dame (Northport) marina. R.52: Exhibit 22 submitted with GTB's reply brief filed 6/2/95 [JA:304].

[6] R.36: Affidavit George Arthur Duhamel (paragraph 14 at page 6) submitted with GTB's summary judgment motion filed 4/17/95 [JA:134], and R.62: Affidavit of John Robertson (paragraph 10 at pages 6-7) submitted with the MDNR Director's brief filed 7/31/95 [JA:369-70].

[7] *See, e.g.*, pages 110-18 (and five pages attached as Plaintiff's Exhibit 1) of the transcript of Gary Bardenhagen's deposition taken April 19, 1995 (R.52: Exhibit 21 submitted with GTB's reply brief filed 6/2/95 [JA:291-303]).

Council enacted special regulations governing use by tribal fishers which address all of the concerns expressed in 1993-1994 by local officials during meetings with GTB representatives as well as the issues raised in their state [8] and federal court pleadings.[9] These regulations even permit the harbor masters to deny GTB fishers the use of mooring slips during periods of peak use in July and August.[10]

The declaratory judgment [11] affirmed below is limited to the specific fact situation of the Leland and Northport sites which is not duplicated anywhere else along the Great Lakes. "The land and water areas upon which the Leland and Northport marinas now rest, historically, were used by the Ottawas and Chippewas to access fishing sites in Lake Michigan and Traverse Bay." *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources,* 141 F.3d 635, 637 (6th Cir. 1998) (Pet. App. A-3 thru A-4) (footnote omitted). This finding of fact, and related finding that Leland and Northport are within the Tribe's

---

[8] On July 8, 1993, the Village of Northport commenced a civil litigation seeking an injunction against the GTB fisher who previously had been charged with criminal trespass by the village when he moored his fishing vessel at the Northport public marina on July 2, 1993 [State of Michigan (Leelanau County) 13th Judicial Circuit Court Case No. 93-3301-CZ]. This case was dismissed the following year. *See* R.36: Affidavit of George Arthur Duhamel (paragraph 7 at page 3) submitted with GTB's summary judgment motion filed 4/17/95 [JA:131].

[9] R.36: Exhibits 1-2 submitted with GTB's summary judgment motion filed 4/17/95 [JA:139-40]; *see id.* R.36: Affidavits of George Bennett (paragraph 5 at page 2) [JA:116] and George Arthur Duhamel (paragraph 17 at pages 6-7) [JA:134-35].

[10] *Id.*, R.36: Exhibit 2 (rule 5) [JA:140].

[11] "IT IS FURTHER ORDERED that the GTB fishers have the right to transient use of the Leland and Northport marina facilities, including mooring slips, . . ." 971 F. Supp. at 284 (Pet. App. E2-2).

reservation,[12] was supported by an ethnohistorian's affidavit testimony (with attached documents) establishing that the precise locations of the present-day Leland and Northport public marinas were utilized by the Tribe at the time of the 1836 and 1855 Treaties to access traditional fishing grounds.[13] 141 F.3d at 637 and n.2 (Pet. App. A-3 thru A-4); *see also Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 285 & 288-89 (W.D. Mich. 1995) (Pet. App. E1-2 thru E1-3 & E1-13 thru E1-15).

After GTB met the FED.R.CIV.P. 56(c) burden by establishing (with affidavit testimony and supporting documents) these facts regarding the Leland and Northport marinas including GTB's historic utilization as well as specific reservation of these sites in the 1855 Treaty, the Municipalities failed to satisfy the corresponding shifting burden under FED.R.CIV.P. 56(e) or the requirement of FED.R.CIV.P. 56(f) "to justify the party's opposition" by presenting affidavit(s) stating the reasons why it was not possible to satisfy the Rule 56(e) shifting burden. The Municipalities similarly failed to refute evidence submitted by the MDNR Director establishing both that transient mooring did not violate the MDNR's contractual agree-

---

[12] *See* footnote 3, *supra* at page 2. "(T)he 1836 treaty reserved for the Ottawas and Chippewas the right to fish in their usual places, which included the waters off the Leelanau Peninsula. Treaty of Washington, 7 Stat. 491. The 1855 treaty preserved a reservation located adjacent to these traditional fishing grounds. Treaty of Detroit, 11 Stat. 621." 141 F.3d at 637 (Pet. App. A-3).

[13] "Although the municipalities baldly assert that GTB's access to traditional fishing grounds was located adjacent to their marinas, they provide absolutely no evidence to substantiate this claim and do not directly challenge the district court's conclusion on appeal." 141 F.3d at 637 n.2 (Pet. App. A-4).

ments and also that it was necessary to effectuate fishing opportunities assured in the 1985 consent decree.[14]

The only issue in contention is whether tribal fishing vessels may utilize these public marinas/harbors of refuge for transient mooring at slips designated for public use.[15] Resolution of this issue required the district court to determine whether the Municipalities may enforce a non-commercial policy against tribal fishing vessels exercising treaty-reserved fishing rights. The Municipalities' primary argument to the district court relied upon the "non-commercial" language in their agreements[16] with the MDNR as the justification for prohibiting GTB's commercial fishing vessels.[17] But the record contains unrefuted evidence

---

[14] 141 F.3d at 640 (Pet. App. A-11 thru A-13); *see* 971 F. Supp. at 285-86 & 290-91 (Pet. App. E1-3 thru E1-6 & E1-19 thru E1-21).

[15] Although within the context of this litigation the Municipalities acknowledge (*see* Pet. 4) that they no longer contest GTB's limited use of their facilities (utilization of launch ramps and as harbors or refuge), previously GTB members risked arrest even if their commercial fishing vessels only used the launching ramps to trailer small boats in and out of the water. R.36: Exhibits 4 & 5 [JA:142-44], and Affidavit of Jack Chambers (paragraph 5 at page 2) submitted with GTB's summary judgment motion filed 4/17/95 [JA:113].

[16] The Municipalities' agreements with the MDNR contain the following identical language: "It is (further) agreed (. . .) that commercial vessels of any type, including but not limited to, charter fishing vessels, shall not be permitted *to regularly use* any of the said facilities without first securing the approval in writing of both the (Township/Village) and the (Commission/Department)." (Emphasis added.) R.38: Exhibits A and B submitted with the Municipalities' motion for dismissal/summary judgment filed 4/17/95 [JA:207 & 215]. *See* 141 F.3d at 638 n.5 (Pet. App. A-7).

[17] Subsequently the Municipalities also contended that the Michigan Constitution vested them with authority to regulate their public marinas; but the Municipalities did not respond to the MDNR Director's argument that as instrumentalities of the State, the Municipalities are required to comply with the district court's consent decree in the *United States v. Michigan* litigation. *See*

that the MDNR considers this contractual provision not to be applicable to the occasional, transient use by tribal fishing vessels at issue in this litigation.[18] Moreover, no factual evidence was presented showing any detrimental result from occasional overnight mooring by tribal fishing vessels at the public marinas.[19] The court of appeals properly concluded that the Municipalities' reliance upon their agreements with the MDNR is incorrect:

> First, under the Supremacy Clause of the United States Constitution, treaties override any conflicting state or local laws. U.S. Const., art. VI. Cl. 2; *ac-*

R.62: MDNR Director's brief filed 7/31/95, at 13-16 [JA:317-20]. *Cf. Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.32 (1979).

[18] The MDNR Director's answer to Municipalities' interrogatory number 6 stated, at page 5:

> Further, paragraph 5 of the May 8, 1967 agreement between the MDNR and Leland Township and paragraph 8 of the December 1, 1988 agreement between the MDNR and the Village of Northport contain identical language prohibiting "regular use" of commercial vessels absent "approval in writing" by the signatories *but clearly contemplates permission of non-regular use by commercial vessels without approval in writing.*
>
> Further, the MDNR has consistently taken the position that the access requested by the Plaintiff was reasonable under the specific facts of the situation; that Plaintiff's request would not undermine the purpose of the agreements; and, that those agreements should not be used as a basis to deny access to the Plaintiffs under the facts of this case.

R.36: Exhibit 18 submitted with GTB's summary motion filed 4/17/95 [JA:173] (emphasis added). *See also* R.62: O.J. Scherschlight deposition transcript at pages 15-16, 35 and 41-42 [JA: 386-87, 406 & 412-13] and Affidavit of John Robertson (paragraphs 3, 9-12 & 14 at pages 2-3 & 5-8) submitted with the MDNR Director's brief filed 7/31/95 [JA:365-66 & 368-71].

[19] "(T)he municipalities have not indicated how GTB would interfere with the use of this property that is already opened for use by the public at large." 141 F.3d at 641 (Pet. App. A-16); *see* 971 F. Supp. at 282 (Pet. App. E1-22).

> *cord United States v. Michigan*, 471 F. Supp. at 281.[20] Second, as noted, MDNR clearly indicates that it believes that GTB is entitled to access to the marina and that the agreements provide no interference with that right. * * * Significantly, GTB does not request any more mooring rights than those that the marinas already allow. Thus, there are simply no reasons why such use would be prohibited. Accordingly, we hold that the 1836 and 1855 treaties provided for an easement of access to reach traditional fishing grounds which includes the right of transient mooring in the municipalities' marinas.

141 F.3d at 641 (Pet. App. A-16).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. SIXTH CIRCUIT CASE NO. 96-1168

A. The Petition Misrepresents The Decision Below

Rule 10 of the Rules of this Court provides that a petition for writ of certiorari will be granted only for compelling reasons, including when the decision of the court of appeals is in conflict with the decision of another circuit, or involves "an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The first category [Rule 10(a)] is lacking.[21] The Municipali-

---

[20] *See also United States v. Michigan*, 653 F.2d 277, 279-80 (6th Cir. 1981), and 712 F.2d 242, 243-44 (6th Cir. 1983).

[21] Not only are there no conflicting decisions, but the Court and lower federal courts consistently have recognized that treaty-reserved fishing rights include a concomitant right to access traditional fishing grounds. *United States v. Winans*, 198 U.S. 371, 379-84 (1905); *United States v. Oregon*, 718 F.2d 299, 303-04 & n.6 (9th Cir. 1983); *Muckelshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510-11 (W.D. Wash. 1988). *See Seufert Brothers Com-*

ties misrepresent the district court's ruling in attempting to fit this matter into the second category [Rule 10(c)]; *see, e.g.*, the following assertions in the Municipalities' petition seeking a writ of certiorari:

> — "(T)his case radically changes the degree to which the rights of state and local governments and other private property owners are subservient to implied tribal rights." (Pet. 7)
>
> — "(O)ther property owners, both public and private, may be required to allow tribal members to occupy improvements to their real estate." (Pet. 8)
>
> — "(T)he court of appeals *created* a type of right that did not exist in 1836 or 1855—a right to appropriate improvements to real property over which the Tribe does not have title." (Pet. 10)
>
> — "By transforming an access right into a right to occupy off-reservation property, the court of appeals' decision in this case threatens the rights of countless private property owners." (Pet. 16)
>
> — "(A) federal court has now held for the first time that off-reservation property owners must give up occupancy of their real property and improvements to Tribal members . . . ." (Pet. 17)

At first blush these assertions seem to indicate "an important question of federal law," because the specter is raised that private property anywhere along the Great Lakes could be usurped. But the Municipalities' assertions are belied by the fact that the district court's partial summary judgment implemented a compromise advocated by the state defendant (MDNR Director). The State of Michigan (rather than the Municipalities) has the primary responsibility for protecting the interests of private property owners along the Great Lakes. In order to protect these interests and to resolve the Municipalities' con-

---

pany v. United States, 249 U.S. 194, 198-99 (1919); *cf. Washington v. Passenger Fishing Vessel Ass'n, supra*, 443 U.S. at 667 & 674.

cern that a favorable court ruling would result in tribal fishing vessels being moored permanently at the public marinas, the MDNR Director proposed a compromise limiting mooring by the Indian Tribe's fishing vessels to the same terms and conditions as are applicable to other transient boats on the Great Lakes utilizing these public marinas.

In the spirit of comity, the Tribe determined to accept the State's proposed compromise; therefore GTB's summary judgment motion requested a declaratory judgment only that tribal fishing vessels be able to use the marinas on the same terms and conditions as other transient boats: "The basic question to be decided by this Court is whether GTB's commercial fishing vessels may moor at these public facilities similar to other transient boaters." [22]

> The issue isn't whether the municipal defendants must "construct or provide access or mooring facilities;" instead, the issue is whether, once constructed, the public marinas may deny GTB use of these facilities (similar to use by other transient boaters) by application of the policy prohibiting commercial use.

R.52: GTB's reply brief filed 6/5/95, at pages 3-4. The Tribe acceded to the MDNR Director's proposed compromise in suggesting that the district court modify the relief requested in paragraph C of the prayer for relief (at pages 10-11) of the First Amended Complaint (R.6) [JA: 32-33]:

> Given the state defendant's position that the provisions prohibiting commercial use contained in the municipal defendants' agreements with the MDNR do not prohibit occasional mooring by tribal fishing vessels, it is not necessary to declare those provisions unenforceable. Instead, declaratory relief should be directed against the municipal defendants' policy/

---

[22] R.36: GTB's summary judgment memorandum filed 4/17/95, at page 4 [JA:73].

> custom denying mooring to tribal fishing vessels, which has the effect of depriving plaintiff's members of access to accustomed fishing grounds as well as fishing opportunities assured by paragraphs 24(d), 25 and 26(a) of the March 28, 1985 Agreement For Entry Of Consent Order in the *United States v. Michigan* litigation (W.D. Mich. File No. M26-73) which was entered as an order of this Court on May 31, 1985.

R.60: GTB's supplemental brief filed 7/24/95, at pages 9-10.

The court of appeals specifically noted the narrow scope of the ruling below in affirming the district court's partial summary judgment: "We note that this decision grants only a transient right to moor on an occasional basis in common with the recreational public who also utilize the facilities." 141 F.3d at 642 (Pet. App. A-20). The court below simply did not decide an important question of federal law.

B. The Questions Presented Were Not Decided Below

The Court's 1986 decisions [23] inform parties opposing summary judgment of the risk in failing to "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986). Nonetheless, the Municipalities failed to comply with the FED.R.CIV.P. 56(e) & (f) burdens [24] regarding the facts referenced *supra*, at pages 2-5. Consequently, the Municipalities are precluded from now asserting facts not contained in

---

[23] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electronic Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[24] "Rule 56(e) thus makes clear the substantial risk of an adverse judgment to a nonresponding opposing party." 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2739 at 520 (2nd ed. 1983).

the record which are contrary to the established facts upon which summary judgment was premised.

The primary argument proffered in the petition—that the declaratory judgment authorizes GTB members *to occupy private property*—was never decided by the district court. The contention that the partial summary judgment "transform[s] an access right into a right to occupy off-reservation property [and] threatens the rights of countless private property owners" (Pet. 16) is premised upon the unsubstantiated allegation that this case involves private property located outside of the Tribe's reservation, *see* Pet. 3 and 16.[25] In fact, this litigation involves public marinas which the district court found to be within GTB's 1855 Treaty reservation.[26]

Thus there is no basis in the record for the asserted first question that the decision below improperly granted "tribal members the right to occupy public and private lands."[27] Nor does this case present the second question whether the court of appeals "rewrote Treaty pro-

---

[25] The Municipalities' assertion that GTB's "reservation lands . . . do not include the lands . . . upon which the marinas now sit" (Pet. 3) is not substantiated by any evidence in the record. To the contrary, the record contains unrefuted evidence that GTB's 1855 reservation includes the on-shore sites where the Leland and Northport public marinas are located. *See* R.36: Affidavit of James M. McClurken, Ph.D. (paragraphs 12-13 at pages 5-6) submitted with GTB's summary judgment motion filed 4/17/95 [JA:98-99]. *Compare* the legal description of GTB's reservation set aside in Article I, clause Fifth of the 1855 Treaty (Pet. App. D-23) with the legal descriptions for the marinas contained in Exhibits A and B to the Municipalities' motion for dismissal/summary judgment filed 4/17/95 (R.38 [JA:220]). The court below affirmed the district court's finding that the "marinas . . . are located within the boundaries of (GTB's) 1855 reservations." 971 F. Supp. at 284 (Pet. App. E1-2), *aff'd* 141 F.3d at 637 (Pet. App. A-3).

[26] *Id.*, 971 F. Supp. at 284 (Pet. App. E1-2), *aff'd* 141 F.3d at 637 (Pet. App. A-3).

[27] Questions Presented (Pet. i).

visions to expand an implied right to fish to include the right to moor." [28]

> It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below. In Hormel v. Helvering, 312 U.S. 552, 556 (1941), the Court explained that this is "essential in order that the parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by a final decision there of issues upon which they have had no opportunity to introduce evidence."

Singleton v. Wulff, 428 U.S. 106, 120 (1976).

C. Conclusion (Sixth Circuit Case No. 96-1168)

This proceeding does not involve an important question of federal law which should be settled by the Court because the partial summary judgment declares only that GTB's fishing rights [29] include a profit *a pendre* [30] upon the precise locations of the Leland and Northport public marinas by virtue of the Tribe's documented historic utilization of these sites as well as their reservation in the July 31, 1855 Treaty with the Ottawa and Chippewa, 11 Stat. 621.[31] The district court specifically refrained from granting the relief which the Municipalities contend is the justification for the writ of certiorari.[32]

---

[28] Questions Presented (Pet. i). *See* 141 F.3d at 641 (Pet. App. A-16), and 971 F. Supp. at 292 (Pet. App. E1-26).

[29] *See United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd* 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

[30] *See* 141 F.3d at 639 n.9 (Pet. App. A-10); *see also United States v. Winans, supra*, 198 U.S. at 379-81, and *United States v. Michigan, supra*, 471 F. Supp. at 276.

[31] *See* 141 F.3d at 637 and n.2 & 638-39 and n.9 (Pet. App. A-3 thru A-4 and A-9 thru A-11).

[32] 971 F. Supp. at 292 (Pet. App. E1-26).

The partial summary judgment affirmed by the court of appeals merely confirms that GTB fishers may utilize the transient mooring slips at the public marinas which are available on a first-come, first-serve basis to all boats on the Great Lakes.[33] To deny tribal vessels utilization of these transient mooring slips on the grounds that it amounts to an impermissible "right to occupy public and private lands" [34] would be akin to depriving Rosa Parks of a seat on a public bus on the grounds that she had no right to occupy municipal property.

II. SIXTH CIRCUIT CASE NO. 96-2396

A. Attorney's Fees Award Was Premised Upon An Alternate Basis Consistent With The Court's Decisions

The Municipalities assert that the attorney's fees award was premised improperly upon a treaty-interpretation claim not involving enforcement of a clearly defined right, citing the distinction between actions brought to interpret treaty rights and actions brought to enforce previously declared treaty rights discussed in *United States v. Washington*, 935 F.2d 1059, 1061 (9th Cir. 1991). The court below noted that the cases are distinguishable.[35] Regardless, review by the Court is not warranted because the award of attorney's fees was predicated upon an alternate basis not discussed in the petition.

---

33 141 F.3d at 642 (Pet. App. A-20). There is evidence in the record that other commercial vessels utilize the Municipalities' marinas on a transient basis without objection. 141 F.3d at 641 (Pet. App. A-16). *See also* R.62: Affidavit of John Robertson (paragraph 13 at pages 7-8) submitted with the MDNR Director's brief filed 7/31/95 [JA:370-71].

34 Questions Presented (Pet. i).

35 Pet. App. B-8 thru B-9 and n.4; *see* Pet. App. E6-4 thru E6-5 and E4-10 thru E4-11.

> Petitioner ignores the fact that respondent did allege constitutional claims which the District Court and the Court of Appeals both found to be sufficiently substantial to support federal jurisdiction under *Hagans v. Lavine*, 415 U.S. 528.

Maher v. Gagne, 448 U.S. 122, 128 n.10 (1980).

In addition to asserting federal question jurisdiction for the claims upon which summary judgment was premised, the Tribe's complaint invoked jurisdiction under 28 U.S.C. § 1343(a)(3) for a cause of action authorized by 42 U.S.C. § 1983 claiming violation of rights guaranteed by the Fourteenth Amendment resulting from tribal fishing vessels being deprived the opportunity to utilize transient mooring generally available to the public. *See* R.6: First Amended Complaint, paragraphs 1(a) and 26 at pp. 1 and 10, Apx. at pp. 27 and 36; *see also Maher v. Gagne, supra*, 448 U.S. at 125. The court of appeals affirmed the district court's ruling that this unaddressed § 1983 claim was a proper basis for the award of attorney's fees under 42 U.S.C. § 1988.[36] This independent basis for the award doesn't depend upon the predicate that GTB's fishing rights must already have been interpreted to include a concomitant right to access traditional fishing grounds from public locations historically utilized by the Indian Tribe. *Cf. id.*, 448 U.S. at 132 n.15.

B. GTB Is Prevailing Party With Respect To Unaddressed § 1983 Claim Premised On Fourteenth Amendment Due Process And Liberty Interests

The Civil Rights Attorney's Fees Awards Act of 1976 (codified as an amendment to 42 U.S.C. § 1988) authorizes courts to award "the prevailing party . . . a reasonable attorney's fee as part of the costs" in civil actions brought pursuant to 42 U.S.C. § 1983. *Maher v. Gagne, supra*, 448 U.S. at 124-25 and ns. 1 & 6. An attorney's

---

[36] Pet. App. B-8 thru B-12, *see* Pet. App. E4-5 thru E4-10.

fee award is not dependent upon litigating the fee-generating § 1983 claim to conclusion. *Id.*, 448 U.S. at 129.

> The legislative history also makes clear that the fact that a plaintiff has prevailed on one of two or more alternative bases for relief does not prevent an award of fees for the unaddressed claims, as long as those claims are reasonably related to the plaintiff's ultimate success.

Smith v. Robinson, 468 U.S. 992, 1007 n.10 (1984) (citations omitted).

1. *Deprivation of liberty interest*

One of the Tribe's members was deprived of his liberty by the Village of Northport when he was arrested for mooring his fishing vessel at the public marina on July 2, 1993; and Leland Township threatened to have him arrested for the same offense when he moored his vessel at the public marina in September, 1994.[37] This violated a liberty interest guaranteed by the Fourteenth Amendment not only because the tribal member was arrested, jailed overnight and prosecuted for criminal trespass, but also because the effect of the arrest (at Northport) and threatened arrest (at Leland) was to deprive GTB-licensed fishers of their freedom to choose and pursue the career of their choice, which incidentally involves the exercise of "federally created and federally protected rights." [38]

> The constitutional interests protected by due process—said to find their origins in the *Magna Carta, see Hurtado v. California,* 110 U.S. 516, 531, 4

---

[37] 141 F.3d at 638 (Pet. App. A-7). *See* R.36: Exhibit 13 and Affidavit of George Arthur Duhamel [paragraphs 7 and 9-11 at pp. 3-5] submitted with GTB's summary judgment motion, Apx. at pp. 157 & 131-33. *See also* R.10: admission in paragraph 20(b) contained in the Municipalities' answer to amended complaint, Apx. at p. 74.

[38] *United States v. Michigan, supra,* 653 F.2d at 278.

> S.Ct. 111, 118, 28 L.Ed. 232 (1884)—are "life, liberty and property." Our method of inquiry is to determine first whether plaintiffs' interests are entitled to protection and second whether defendants violated the process due them.
>
> Liberty and property interests are intricately related in our system of political economy, a system based on free choice of careers and occupations, private property, and the right to compete. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122, 31 L.Ed. 2d 424 (1972) (Justice Stewart for the Court observed that "a fundamental interdependence exists between the personal rights to liberty and the personal right to property.") A complex of rights and duties characterizes any particular liberty or property interest. Generally speaking, freedom to choose and pursue a career, "to engage in any of the common occupations of life," *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), qualifies as a liberty interest which may not be arbitrarily denied by the State.

Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983). The district court's partial summary judgment was premised upon findings of undisputed facts that GTB fishers were being deprived of the ability to harvest fish from traditional fishing areas by the denial of mooring at the Leland and Northport marinas.[39] The court of appeals concluded that this deprivation may serve as a basis for constitutional relief, citing *id.*, 699 F.2d at 328, *Greene v. McElroy,* 360 U.S. 474, 492 (1959), and *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238 (1957). Pet. App. B-11 thru B-12.

2. *Deprivation of property right*

"The right to enjoy property without unlawful deprivation, . . . is in truth a 'personal' right," which is cogniza-

---

[39] 971 F. Supp. at 290-91 (Pet. App. E1-18 thru E1-21), *aff'd* 141 F.3d at 639-40 (Pet. App. A-11 thru A-13).

ble under 42 U.S.C. § 1983. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Denying GTB access to traditional fishing grounds accessible from the Leland and Northport sites historically utilized by tribal ancestors had the effect of depriving GTB of a property right protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[40] *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 410-13 (1968). The court of appeals affirmed the district court's determination that this constitutional claim is substantial. Pet. App. B-10 thru B-11.

3. *Non-fee claims reasonably related to unaddressed § 1983 claim*

Respondent GTB clearly is a "prevailing party" within the meaning of 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 433 and ns. 7 & 8 (1983); *see Farrar v. Hobby*, 506 U.S. 103, 109-12 (1992). Although the ruling below was not premised upon GTB's § 1983 claim seeking to vindicate deprivation of the constitutionally-protected liberty interest and property right, attorney's fees were properly awarded pursuant to 42 U.S.C. § 1988 because "plaintiff . . . prevailed on one of two or more alternative bases for relief . . . (which) are reasonably related to the plaintiff's ultimate success." *Smith v. Robinson, supra*, 468 U.S. at 1007 n.10. The legislative history of § 1988 confirms that an attorney's fees award may be premised upon the unaddressed § 1983 claim if it meets the "substantiality" test[41] which requires a finding that this

---

[40] "The Tribes' right to take fish is a property right, protected under the fifth amendment." *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) [citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 & 412 (1968)].

[41] *See Hagans v. Lavine*, 415 U.S. 528, 536-39 (1974).

claim involves a "common nucleus of operative fact" [42] as the claims upon which the partial summary judgment was based.[43] *Maher v. Gagne, supra,* 448 U.S. at 132 n.15. The court of appeals followed the Court's decisions in concluding that the non-fee claims upon which the district court's declaratory judgment was premised and the unaddressed constitutional claim are based upon a common core of facts and involve similar legal theories. Pet. App. B-9 thru B-12; *see* Pet. App. E4-3 thru E4-7.

C. GTB Also Could Be Considered Prevailing Party Under 42 U.S.C. § 1988 With Respect To The Claim Arising Under The Treaty Of 1836

Attorney's fees are warranted pursuant to § 1988 for actions brought to enforce previously interpreted rights. *United States v. Washington, supra,* 935 F.2d at 1061. The relevant inquiry is whether the ruling below *interpreted* Indian treaty rights or merely *enforced* previously declared treaty rights. Contrary to the Municipalities' contention, the "Treaty claim" [44] involved enforcement of the off-reservation fishing rights previously affirmed by the court of appeals in the related *United States v. Michigan* litigation.[45]

---

[42] *See United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966).

[43] The ruling below was premised upon claims arising under the 1836 Treaty and 1985 consent decree in the related *United States v. Michigan* litigation. 971 F. Supp. at 293 (Pet. App. E1-29 thru E1-30); *see* 141 F.3d at 638-42 (Pet. App. A-8 thru A-20).

[44] The cause of action arising directly under the March 28, 1836 Treaty with the Ottawa and Chippewa (7 Stat. 491) premised upon federal question jurisdiction was described by the district court as the "Treaty claim." 971 F. Supp. at 284 & 287 (Pet. App. E1-11 & E2-1). An alternate jurisdictional basis for this claim was asserted under 28 U.S.C. § 1343(a)(3) for a cause of action premised upon 42 U.S.C. § 1983. *See* R.6: First Amended Complaint, paragraphs 1(a) and 26 at pp. 1 and 10, Apx. at pp. 27 and 36.

[45] *United States v. Michigan,* 471 F. Supp. 192, 278-81 (W.D. Mich. 1979), *aff'd* 653 F.2d 277 (6th Cir. 1981), *cert. denied,* 454 U.S. 1124 (1981).

These fishing rights declared by the district court in 1979 include the right to access traditional fishing locations necessary to exercise the rights:

> Indian title to lands has never been a fee; it has always been a right to use and occupy lands claimed by the United States. This interest in land gives the tribes holding it the right to fish, hunt, gather fruits and cross the land. It is analogous to a profit a pendre or an easement. *United States v. Winans, supra.* The Indians reserved such an interest in land by the Treaty of 1836.

United States v. Michigan, supra, 471 F. Supp. at 276. Utilization of the launching ramps and transient mooring slips at the public marinas on the same terms and conditions as other transient boats is merely a concomitant aspect of the previously confirmed fishing rights. *United States v. Winans, supra,* 198 U.S. at 380-84; *see* 971 F. Supp. at 288-89 (Pet. App. E1-13 thru E1-18), and 141 F.3d at 639 (Pet. App. A-10 thru A-13). Thus the award of attorney's fees also could have been premised directly upon the "Treaty claim" as an unaddressed cause of action arising under 42 U.S.C. § 1983. *See* Pet. App. B-8 thru B-9 and ns. 4-5, and Pet. App. E4-10 thru E4-11 & Pet. App. E6-4 thru E6-6.

CONCLUSION

(Sixth Circuit Case Nos. 96-1168 and 96-2396)

The foregoing discussion demonstrates that the questions presented in the Municipalities' petition misrepresent the court of appeals' decisions, which neither conflict with other decisions nor involve an important federal question that should be settled by the Court. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

WIL
670CLIAM CHARLES RASTETTER, III
Ced:0 French Road
(61ear, Michigan 49621
*Cou*6) 228-6300
Ginsel of Record for Respondent
Grand Traverse Band of
)ttawa and Chippewa Indians

Dated: October 21, 1998